Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PATRICIA FEERICK, JOHN DEVITO,
ORLANDO ROSARIO AND MAYRA SCHULTZ,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a public servant in New York State is compelled to testify under a grant of "use" immunity and there is powerful evidence in a post-trial motion based on newly discovered evidence concerning an egregious *Kastigar* violation that the prosecution's "independent source" for trial witnesses and trial strategy were illegally generated from the "use immunized" testimony, is a **testimonial** evidentiary hearing required under Kastigar v. U.S., 406 U.S. 441, to satisfy the prosecutors "heavy burden" in order to ensure that petitioners' 5th and 14th amendment constitutional rights are protected?

PARTIES TO THE PROCEEDING

There are no parties to the proceedings below other than those named in the caption.

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Petitioners Feerick, Rosario, Devito and Schultz respectfully beg this Court that a Writ of Certiorari be issued to review the Decision and Order of the Appellate Division, First Department, of the New York State Supreme Court.

OPINIONS AND JUDGEMENTS BELOW

The Certificates denying discretionary review are not published but are reproduced in the Appendix to this Petition. *Infra,* A1-A4. The Decision and Order of the Appellate Division, First Department, of the New York State Supreme Court is reported and is reproduced in the Appendix to this Petition. *Infra,* A-5. People v. DeVito, 287 A.D.2d 265, 731 N.Y.S.2d 5 (1st Dept. 2001). The Decision and Order of the Supreme Court New York County (Sudolnik, J) is not published but is reproduced in the Appendix to this Petition. *Infra* at A-8. The Decision and Order of the Supreme Court New York County (Wittner, J) is not published but is reproduced in the Appendix to this Petition. *Infra* at A-11.

JURISDICTIONAL STATEMENT

The Decision and Order of the New York State Court of Appeals denying discretionary review was entered on March 6, 2002. Jurisdiction exists under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor

shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST. Amend. XIV § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

This case involves the preservation of a Police Officer's fundamental Fifth Amendment constitutional rights. It goes directly to the integrity of the practice of compelling testimony from Police Officers. This case has national impact affecting literally hundreds of thousands of Police Officers throughout America. Police Officers in New York State, as a result of this case, have had their 5th amendment constitutional rights eradicated, creating a situation which necessitates your Court's intervention.

1. THE UNDERLYING INCIDENT

On September 22, 1990, in a drug plagued section of East Harlem, a homicidal drug organization stole a Police radio from petitioners, all New York City Police Officers. On September 26, 1990, petitioners, under the supervision of Petitioner Feerick, a former New York City Police Lieutenant, conducted an investigation regarding the stolen radio. The

stolen radio was being used by the drug organization and was jeopardizing the safety of the officers and the community. As a result of the investigation conducted by petitioners, members of the drug organization, drug addicts and drug dealers, filed a complaint against petitioners.

2. THE COMPELLED TESTIMONY

In January of 1991 after an extensive investigation by the New York City Police Department's Internal Affairs Division (hereinafter "NYPD" & "IAD") on behalf of the District Attorney of the State of New York, a formal decision was made not to prosecute the petitioners. The prosecutor had hit a standstill in the investigation and the only witnesses were "admitted substance abusers". A copy of the Index sheet that recorded all the investigative steps taken in chronological order is reproduced in the Appendix of this Petition. *Infra,* A-45.

Unbeknownst to petitioners at this time, the chief investigator, Lieutenant Foley of NYPD's IAD, conspired with the prosecutor, ADA Stephens, to violate the constitutional rights of the petitioners. It was agreed that any useful information Lt. Foley obtained during the compelled interrogations would be shared with the prosecutor in order to pursue criminal charges.

Ostensibly, because the D.A.'s Office had declined to prosecute, Lt. Foley immediately proceeded with administrative interrogations of all of the officers pursuant to the provisions of P.G. §118-9. [1]Under P.G. §118-9, Police

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[1] P.G. §118-9 states:

> If a member of the service (uniformed or civilian) is under arrest, or is the subject of a criminal investigation or there is a likelihood that criminal

Officers are compelled under threat of job forfeiture to respond to questions narrowly related to the performance of official police duties. In exchange for such compelled testimony, use and testimonial immunity is automatically conferred on any testimony given by the officers.

In January of 1991 all petitioners were interrogated under the provisions of P.G.§ 118-9. Immediately subsequent to

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> charges may result from the investigation, the following warnings shall be given to the member concerned prior to commencement of the interrogation;
>
> I wish to advise you that you're being questioned as part of an official investigation of the Police Department. You will be asked questioned specifically directed and narrowly related to the performance of your official duties. ***You are entitled to all the rights and privileges guaranteed by the laws of the State of New York, the Constitution of the State of New York, the United States Constitution, including the right not to be compelled to incriminate yourself, and the right to have legal counsel present at each and every stage of this investigation.***
>
> I further wish to advise you that if you refuse to testify or to answer questions relating to the performance of your official duties, you will be subject to Department charges which could result in your dismissal from the Police Department. ***If you do answer, neither your statement nor other information or evidence which is gained by reason of such statements can be used against you in any subsequent criminal proceedings.*** However, these statement [sic] may be used against you in relation to subsequent departmental charges.

their P.G.§ 118-9 interrogations, the criminal investigation was reopened. As a direct result of these compelled interrogations the prosecutors illegally obtained the identity of two critical trial witnesses, Sgt. Masci and Inspector Friedlieb and generated their trial strategy. This "use" ultimately resulted in the illegal convictions of the petitioners.[2] This was a flagrant and impermissible violation of petitioner's 5th and 14th amendment rights.

All the petitioners were fired and three of them went to prison while the drug dealers went free. Petitioner Feerick was incarcerated from September 21, 1999 to October 25, 1999 at which time the Honorable Governor George E. Pataki commuted her two-year sentence on Misdemeanors, and she was immediately released from prison.

3. EARLIER KASTIGAR PROCEDURAL HISTORY

In a pre-trial motion to dismiss the indictment on the grounds that petitioners' immunized testimony had been utilized by the People in order to obtain the indictment, a pre-trial *Kastigar* hearing was held.

The pre-trial *Kastigar* court ultimately restricted the hearing to ascertaining the prosecutors' independent source of

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[2] Regarding the underlying convictions all petitioners were convicted of the following Misdemeanors; unlawful imprisonment in the second degree (four counts); coercion in the second degree (one count); criminal trespass in the second degree (one count [two counts Feerick]), official misconduct (one count [two counts Feerick, Rosario & Devito]); and the following Felonies; Perjury Rosario only; Falsifying business records Devito only.

By Order dated June 8, 1999, the Court of Appeals of New York State affirmed the convictions. People v. Feerick, et al; 93 N.Y.2d 433, 692 N.Y.S.2d 638 (1999)

a witness identified as Benjamin Stokes, a high ranking member of the homicidal drug organization. The pre-trial *Kastigar* court stated that the prosecutor had an independent source and did not use the petitioners' immunized testimony.

In October 1994, in a Post-sentencing motion, the petitioners renewed their *Kastigar* claim. Petitioners contended that based on several internal Police department memoranda, it was apparent that the summarizations of the defendants' P.G. § 118-9 interrogations, which appeared therein, had been utilized in the prosecution of the case. The prosecutors submitted affidavits to refute petitioners' claim and the trial court refused to grant a testimonial hearing. It was at this juncture that Lt. Kim Foley submitted a false affidavit on behalf of the prosecutors. A copy of Lt. Foley's affidavit is reproduced in the Appendix to this Petition. *Infra,* A-34. In this affidavit Lt. Foley falsely identified a Lt. John Comparetto as her independent source for search warrant information that was utilized at the petitioner's criminal trial. Upon learning of Lt. Comparetto's name for the first time, petitioners immediately contacted Lt. Comparetto. Lt. Comparetto said he never spoke to Lt. Foley in September of 1990, in fact he spoke to her immediately after petitioners' compelled interrogations. Lt. Comparetto stated he would be willing to submit an affidavit, but according to the NYPD's Rules and Regulations, he needed the permission of the Police Commissioner. A copy of Lt. Comparetto's request to sign the affidavit is reproduced in the Appendix of this Petition. *Infra,* A-51.

The NYPD did not allow Lt. Comparetto to submit the affidavit. On January 13, 1995, four months after Appellants' sentencing, the Deputy Commissioner of Legal Matters of the NYPD, forbade Lt. Comparetto from submitting his affidavit as follows:

> "Deputy Commissioner, Legal Matters to Police Commissioner, January 13, 1995. I have reviewed this request and recommend that it be disapproved. This signing of this affidavit by Lieutenant Comparetto in support of a convicted felon is not in the best interest of the Department. Further, Lieutenant Comparetto should be instructed that it is inappropriate for him to represent to any party that his statements in this matter are provided on behalf of the New York City Police Department." The Denial is reproduced in the Appendix of this Petition. *Infra* at A-56 [Fifth endorsement]

As is tragically evidenced, the petitioners were prohibited and deliberately thwarted from obtaining the evidence necessary in 1994 to prove an egregious violation of their constitutional rights because the NYPD, as an agent of the prosecutor, did not allow active Lt. John Comparetto to submit a truthful affidavit in 1994. Subsequently, the trial Judge denied the CPL 440.10 motion without a testimonial hearing based the prosecutor's affidavits.

During the course of the direct appeal in 1996 the Appellate Division 1st Department remanded the case back to the Pre-trial *Kastigar* Judge and directed her to review worksheets in camera to determine if any of them constituted *Rosario* material. The Judge found six *Rosario* documents and conducted a very restricted re-opened *Kastigar* hearing. At this hearing the court summarily denied requests by defense counsel to call a "Mystery Witness" who was identified as an active high-ranking member of NYPD's IAD who was willing to testify without permission of the NYPD but did not want his name revealed ahead of time for fear of losing his job. This "Mystery witness" had come forward, and would testify that he had direct knowledge of an improper agreement

between the prosecutor and Lt. Foley to the effect that (a) the formal letter of the prosecutor declining criminal prosecution of petitioners in January of 1991 was a sham, and (b) that Lieutenant Kim Foley was surreptitiously and illegally providing the substance of the P.G. 118-9 compelled testimony to A.D.A. Stephen. The *Kastigar* court refused to address the conspiracy evidence offered by defendants and did not allow the testimony of the "mystery witness." By Order dated June 8, 1999, the Court of Appeals of New York State affirmed the convictions. People v. Feerick, 93 N.Y.2d 433 (1999).

4. THE NEWLY DISCOVERED EVIDENCE COMPELLINGLY DEMONSTRATES A FLAGRANT CONSTITUTIONAL VIOLATION

Sadly for petitioners, due to the prosecutors' actions, the evidence necessary to prove the egregious violation of petitioners' constitutional rights was not available until 1999. At that time, during their incarceration, high-ranking members of the NYPD retired. The "Mystery Witness", Captain Matthew Carmody, retired in 1999 and was able to submit an affidavit without fear of repercussions from the NYPD. This affidavit is reproduced in the Appendix to this Petition. *Infra,* A-28.

As a result of retired Capt. Carmody's affidavit, Habeas Corpus Petitions were submitted on behalf of petitioners Feerick, Rosario and Devito that compellingly supported their contention that an egregious *Kastigar* violation had occurred and they now had the evidence necessary to prove it in the form of an affidavit that was previously unavailable. The Habeas Corpus petition was filed in Queens County, the place of petitioners' incarceration. For the first time since petitioner's prosecution this federal constitutional issue went before an impartial and unbiased Justice who was not under the jurisdiction of the New York County District Attorney's Office.

On December 30th, 1999 a Decision and Order was rendered by Honorable Charles J. Thomas of Supreme Court, State of New York, County of Queens. It is reprinted in the Appendix of this Petition. *Infra*, A-18. Judge Thomas ordered a *post-trial Kastigar* hearing as follows:

> Analyzing the above, the record indicates that the allegations set forth in the Carmody affidavit were never legally considered either by the hearing or trial court in the petitioner's case since the witness never appeared to testify. As this evidence was never presented, it appears that the petitioners have valid grounds for a hearing under CPL 440.10 to vacate judgement. Indeed the People have conceded this, pointing out with commendable candor in the Rosario Memorandum of Law (p 2-4), the Carmody affidavit does furnish a basis for a CPL 440.10 motion, either under the grounds of a newly discovered evidence or constitutional violations. However since Petitioners have grounds for CPL 440 relief, Habeas Corpus is not an appropriate remedy (People v. Smith, supra.)...
>
> The application for a Writ of Habeas Corpus is denied as to reversal of conviction, however, it is granted to the limited extent that a CPL 440.10 hearing will be held in New York County based on the issues raised by former Police Officer Matthew J. Carmody's affidavit." *Infra* at A-26 to 27.

Upon transfer to the New York County court, the court refused to conduct the constitutionally required hearing. Petitioners then submitted a 440 motion compellingly outlining

why such a hearing was required under Kastigar v. U.S., 406 U.S. 441 (1972). Within this motion was an additional affidavit submitted by now retired Lieutenant John Comparetto. This affidavit is reproduced in the Appendix to this Petition. *Infra,* A-31. Since Lt. Comparetto was retired he no longer needed the permission of the NYPD to submit a truthful affidavit. Lt. Comparetto's affidavit compellingly demonstrated that Lieutenant Kim Foley submitted a false affidavit in 1994, fabricating evidence concerning how she, as the supervisor of the investigation, became aware of a search warrant that was obtained on September 25, 1990. Two trial witnesses were generated from this information, Inspector Friedlieb and Sgt. Masci as well as the prosecutor's trial strategy.

The courts, without a testimonial hearing, summarily denied Defendants-Petitioners' joint motion pursuant to CPL §440.10 to vacate their respective judgments of conviction dismissing the indictment, or ordering a new trial with a pre-trial *Kastigar* Hearing, or for a hearing pursuant to Kastigar, *supra*, based on newly discovered evidence.

REASONS FOR GRANTING THE WRIT

I. CATASTROPHIC FACTUAL MISTAKES WERE MADE REGARDING PETITIONERS NEWLY DISCOVERED EVIDENCE WHICH STRIPPED PETITIONERS OF THEIR 5TH AMENDMENT CONSTITUTIONAL RIGHTS UNDER KASTIGAR V. U.S., 406 U.S. 441, DEPRIVING THEM OF DUE PROCESS UNDER THE UNITED STATES CONSTITUTION

Although your Court rarely grants a writ of certiorari where the asserted error consists of erroneous factual findings, in the instant case the catastrophic errors cannot be ignored in order to ensure the fundamental constitutional rights of the petitioners afforded under Kastigar, *supra*, and the constitution are protected. Your Court "will review findings of fact by state courts (1) where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon federal question, to analyze facts." Northern P.R. Co. v. North Dakota 236 U.S. 585, 593 (1915); Norfolk & W. R. Co. v Conley 236 U.S. 605 (1915); Interstate Amusement Co. v. Albert 239 U.S. 560 (1916); Fiske v. Kansas 274 U.S. 380 (1927); Norris v. Alabama 294 U.S. 587(1935). In the instant situation the facts must be reviewed because the conclusions of law as to 5th and 14th amendment constitutional rights and the findings of facts are so intermingled as to make it necessary.

The New York State courts have clearly not followed the fundamental constitutional provisions established in Kastigar, *supra*. The New York Courts' blatant disregard of the facts in this case have completely distorted federal legal precedent in New York State. This distortion will affect 5th and

14th amendment rights of Police Officers throughout New York State. The unconstitutional legal precedent applied to these petitioners can also negatively impacts the fundamental constitutional rights of hundreds of thousands of Police Officers throughout America.

In New York State a court may vacate a criminal conviction on the basis of newly discovered evidence if the evidence: (1) will probably change the results if a new trial is granted, (2) is discovered since the previous proceeding, (3) was not discoverable before the trial by the exercise of due diligence, (4) is material to an issue at defendant's trial, (5) is not cumulative and (6) is not merely impeachment testimony. People v. Salemi, 309 N.Y. 208 (1955). All six of these factors must be present before a court may grant a new trial. The defendant bears the burden of proof.

The state court violated petitioners' due process rights by recklessly ignoring compelling newly discovered evidence and made a finding of fact specifically tailored to fit the parameters of Salemi, *supra*. The New York State Courts refused to require the People to sustain their constitutionally imposed burden of affirmatively establishing that the government (including the prosecutors, prosecutorial investigators, and prosecution witnesses) had made no "use" of immunized testimony in procuring the conviction.

The appellate court's ruling that the affidavits from two recently-retired supervisory Police Officers submitted by petitioners did not constitute newly discovered evidence within the meaning of CPL 440.190 (g) is clearly erroneous and in blatant disregard of *Kastigar* law. The affidavits of Carmody and Comparetto clearly meet all of these requirements. The courts' reasoning for denying the motion is factually and legally incorrect and in complete disregard to the facts placed before them.

The Appellate Court stated in their decision:

> Defendants offered **no reasonable excuse** for their failure to come forward with the information contained in theses affidavits at an earlier date, **either at trial, or at the first CPL 440.10 motion made in 1994, when the information was unquestionably known to Defendants. Indeed, the record establishes that one of these witnesses was assisting the defense at the time of sentencing.** Moreover, the Police Department's disapproval, in January 1995, of the other witness's request to sign an affidavit in support of Defendants, who had already been sentenced, fails to explain why the defense did not make use of the proffered evidence **at trial or on the first CPL 440.10 motion.** (Emphasis supplied) *Infra* at A-6.

This **catastrophic legal and factual** mistake by the New York Courts was fully addressed within petitioner's motions before the Court. The ruling is clearly erroneous due to the fact that the two newly discovered affidavits were never available prior to or during the trial in 1994.

Lt. John Comparetto's information was never known to petitioners during the trial, nor was it available for the post sentencing 440.10 motion. It is uncontested that the first time the name of Lt. John Comparetto became known to the petitioners was from the false post-sentencing affidavit of Lt. Kim Foley dated 11/29/94 submitted by respondent in their opposing papers in response to petitioner's original 440.10 motion. It is this affidavit of Lt. Kim Foley that identifies Lt. John Comparetto as her source of the search warrant information. Attendant thereto, there was absolutely no way that petitioners could have known about the identity, existence or

relevance of Lt. John Comparetto or Captain Matthew Carmody before trial.

It is clear from the New York courts' ruling that they completely ignored the fact that Lt. Comparetto was **forbidden from submitting an affidavit**! As was made painstakingly clear to the New York court, petitioners were prohibited from having affidavits submitted. No matter how the New York court tries to distort the facts, the only time Appellants were able to obtain these affidavits was when the affiants retired from the Police Department in 1999. *Infra* at A-56 [Fifth endorsement]

It is the DA's actions and those of their agents that thwarted petitioners from acquiring the proof necessary to support their position years ago. Clearly none of this information was available before or during trial.

As the habeas court determined, the record clearly indicates that the allegations set forth in the Carmody affidavit and the Comparetto affidavit were never legally considered by the trial court. Said affidavits could not be submitted sooner since both men were employed by the NYPD and would have faced retribution for submitting an affidavit without Police Department approval. This was evidenced by Comparetto's request, which was refused. Carmody and Comparetto retired in 1999 and therefore they are free men who no longer have to fear retribution from the NYPD.

Secondly, the Appellate Court found as follows: "Furthermore, one affidavit was based on hearsay and the other merely constituted impeachment evidence, and neither affiant had personal knowledge bearing on the central issue of whether the People had made use of the defendants' immunized statements."

Let there be no mistake about the import of these Affidavits. By Carmody and Comparetto's affidavits the very essence of a *Kastigar* violation has been dramatically demonstrated. Specifically, theses affidavits prove that an Assistant District Attorney directed a supervisor of the Police Department's administrative investigation to keep him apprised of any "new information" arising out of Defendants' P.G. § 118-9 compelled interrogations. A more egregious violation of Kastigar, *supra,* and its progeny (see, e.g., United States v. North I, 910 F.2d 843 [D.C. Cir. 1990], modified, North II, 920 F.2d 940 [D.C. Cir. 1990], cert. denied, 501 U.S. 941 [1991]) is most difficult to fathom. Such actions are abhorrent to the fundamental principles enumerated in Kastigar, *supra.*

In fact this Court must recognize that the affidavits were submitted as newly discovered evidence to support a factual determination regarding a crucial *Kastigar* Issue: When did the prosecution become aware of the search warrant information as well as the identity of Inspector Friedlieb and Sergeant Masci. Categorization in a legal standard by New York courts as "mere impeachment" was wrong in this situation and your Court must recognize this.

Neither affidavit was offered merely as impeachment testimony. The affidavits were submitted in support of the fact that there was a concerted effort on the part of certain members of the police department along with the DA's office to violate petitioners' constitutional rights during the course of their criminal investigation, and respondents' actions at the trial prove that this occurred.

A plain reading of these affidavits clearly shows that Comparetto's affidavit is not a mere impeachment affidavit solely going towards Lt. Foley's credibility. In fact his affidavit goes to a central factual point regarding the *Kastigar* issue. To

wit: When did Lt. Foley become aware of the search warrant information from Lt. Comparetto? Did she become aware of it shortly after the underlying incident in question, of which the date is September 26th, 1990, as she states in her affidavit? Or did she become aware of the search warrant information in late January/early February of 1991 as Lt. Comparetto states in his affidavit, immediately after petitioners compelled interrogations. Lt. Comparetto's factual assertion is compellingly supported by the investigative activity documented on the MNFIAU index sheet.

In order for this Court to address the blatant disregard for the facts demonstrating a compelling and flagrant *Kastigar* violation that resulted in the illegal conviction of these petitioners, all this Court has to do is look at the affidavits and the investigative index sheet that are before this Court. Common sense and judicial fairness require that this Court can not ignore what has been so blatantly ignored by the New York State Courts.

It is hereby respectfully requested that the Court review the index sheet outlining the investigation concerning petitioners' prosecution. *Infra*, A-45. The index sheet clearly indicates that the first time anything shows up concerning the search warrant information, which identified two trial witnesses Inspector Friedlieb and Sergeant Masci, occurred immediately after petitioners compelled interrogations, which commenced on January 17, 1991.[3] *Infra,* A-47. Worksheets #59, 60, 63, 68 and 70 are reproduced in the Appendix to this

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[3] On page A-47 of the Appendix to this Petition the compelled interrogations are indicated on the Index Sheet as "G.O.-15" Feerick; "G.O.-15" Rosario; "G.O.-15" Schultz and "G.O.-15" Devito. In the New York City Police Department the terminology of P.G.§ 118-9 and G.O.-15 are used interchangeably. Both terms equate to "compelled interrogations"

Petition. *Infra* at A-37; A-39; A-40; A-41 and A-43 respectively. .

The affidavit of retired Lt. Comparetto, *infra*, A31, is completely contradictory to the affidavit of Lt. Foley. *Infra*, A-34. The prosecution's index sheet only supports Lt. Comparetto's affidavit. *Infra*, A-47. The search warrant information shows up for the first time immediately after petitioners' compelled interrogations. *Infra* A-37-44. It is abundantly clear that the prosecution's own index sheet does not support Lt. Foley's affidavit. In total contradiction to what Lt. Foley states, there is absolutely no documentation regarding the search warrant information prior to the compelled interrogations of petitioners. *Infra* A-45 to A-47. Finally, the affidavit of retired Captain Carmody is supported by the index sheet as well. *Infra*, A-28.

There is compelling evidence which overwhelmingly supports petitioners' claim. The record itself supports this assertion. That is why within the New York court decisions there is **NO REFERENCE AT ALL** to the index sheet. The New York court completely ignored these facts. The New York courts are fixated on the original preliminary pre-trial *Kastigar* Hearings, and refuse to look at the newly discovered evidence in light of what occurred at trial.

Comparetto's affidavit does not merely impeach Foley's affidavit, it totally supports petitioners' assertion that there was a conspiracy to violate their constitutional rights, and that said conspiracy was carried out as is evidenced by the index sheet, the trial witnesses, trial theory, etc. It is clear that the New York courts have legally categorized defendants affidavits as mere impeachment to conform to the guidelines of Salemi, *supra*, and is wrong as a matter of law and fact and cannot be condoned.

Finally, the trial court never addressed the impact of the affidavits at trial because the court clearly did not understand what "use" equals under Kastigar, *supra*. The trial court incorrectly stated:

> Thus, even if the Carmody affidavit were credited, it would establish no more than an agreement to use, not the actual use of, immunized testimony to secure the criminal convictions. The mere existence of such an agreement is irrelevant where no such testimony was actually used improperly. *Infra*, A-14.

The trial court utterly failed to recognize that the identity of Inspector Friedlieb, Sgt. Masci and the search warrant information were generated directly from the constitutionally protected testimony of petitioners. Had petitioners never undergone a compelled interrogation the prosecution would never had known of the existence of Inspector Friedlieb, Sgt. Masci and the search warrant information. It is abundantly clear that the trial court did not equate the "identity of trial witnesses" or "trial strategy" as equal to the "use" of immunized testimony under Kastigar, *supra*.

Without the testimony of Inspector Friedlieb, Sgt. Masci and the search warrant information the trial would have consisted of what the prosecutor had immediately prior to petitioners' compelled interrogations, "admitted substance abusers". In fact, with only admitted substance abusers, the prosecutor had originally declined to prosecute.

In Kastigar, at 453 your Court states:

> Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore ensures that the testimony cannot lead to the infliction of criminal penalties on the witness.

Where, as here, immunized statements provided the criminal investigators with leads which allowed them to develop both evidence and strategies for use at trial the damage to petitioners is real, and the constitutionally mandated protection must be applied. Lefkowitz v. Turley, 414 U.S. 70 (1973); Gardner v. Broderick, 392 U.S. 273 (1968); United States v. Semkiw, 712 F. 2d 891 (3rd Cir. 1983); United States v. McDaniel, 482 F. 2d 305 (8th Cir. 1973): United States v. Smith, 580 F. Supp. 1418, (D.N.J. 1984) United States v. Poindexter, 951 F.2d 369 (D.C.Cir. 1991). There is simply no limitation upon the proscription of the use of investigatory evidence derived from immunized statements. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), Kastigar, *supra*. Such evidentiary and non-evidentiary use of immunized testimony is prohibited, because any grant of immunity in exchange for compelled testimony must be co-extensive with the Fifth Amendment privilege against self-incrimination. Pillsbury v. Conboy, 459 U.S. 248, 254 (1983). Under the circumstances, petitioner's rights to due process were violated.

II. WHEN THERE IS COMPELLING EVIDENCE THAT DEMONSTRATES THE PROSECUTORS' AFFIDAVITS ARE FALSE CONCERNING THEIR INDEPENDENT SOURCE, THIS COURT SHOULD REQUIRE A TESTIMONIAL EVIDENTIARY HEARING UNDER KASTIGAR V. UNITED STATES, 406 U.S. 441

This case involves a fundamental constitutional right concerning due process under Kastigar, *supra*. Petitioners contend that under the constitution they were entitled to a post-trial evidentiary hearing entailing the taking of live testimony. The lower court should not have denied a post-trial motion without an evidentiary hearing under Kastigar, *supra*, when defendants' newly discovered evidence directly contradicts the affidavits submitted by the prosecutor. The prosecutor's own records demonstrate that Lt. Foley submitted a false affidavit on behalf of the prosecutors concerning their independent source of the search warrant information that was used at trial.

In the case at bar, the New York courts have turned a blind eye to perjury by denying a full flown testimonial hearing and are supporting perjury of the prosecutors by not challenging clearly false assertions of the prosecutor's witnesses.

The Appellate Court cited People v. Loomis, 683 N.Y.S.2d 854 (3rd Dept. 1998), in determining that the lower courts were not obligated to hold any evidentiary hearing. Your Court must determine whether the same legal principle enumerated in Loomis, *supra,* applies to a *Kastigar* legal issue.

In petitioners' case the New York courts' ruling was based solely on the submission of affidavits, which were

completely contradictory. The New York courts refused to grant a testimonial hearing. Crucial facts were at issue and the New York courts ignored these crucial facts. It is clear to petitioners that the application of Loomis, *supra,* to a *Kastigar* issue is not in line with the principles enumerated in Kastigar, *supra* and related cases. Mere denials by the New York County D.A.'s office that they did not use immunized testimony does not satisfy the "heavy burden" placed on prosecutors to negate the taint in this matter. See *United States v Hampton*, 775 F.2d 1479, 1485 (11th Cir. 1985); *United States v. Nemes*, 555 F.2d 51, 55 (2nd Cir. 1977); *United States v. Sieffert*, 463 F.2d 1089, 1092 (5th Cir. 1974). In petitioners' case the prosecutors' affidavits, essentially full of "mere denials", were totally contradicted by the affidavits petitioners submitted. In total contradiction of case law, the lower courts found the prosecutors' assertions sufficient to satisfy the "heavy burden" in negating the taint. The New York courts are clearly wrong.

In light of the circumstances, the determination should have been based upon a factual background developed through an evidentiary hearing that necessitated the taking of live testimony. As in *United States v. North II*, *supra* at 942, it is clear that such a hearing is necessary because otherwise the burden of proof would be improperly shifted onto the defendant. The *North II* court specifically stated, "Most importantly, the defendant is entitled to a hearing at which he would be able to challenge the prosecution's case for non-use."

In Kastigar, *supra*, your Court held that where a person was compelled to give statements under a grant of "use immunity", the burden of proof is on the government to establish that it made no evidentiary use of that person's compelled statements. Your Court also stated that a defendant need not merely rely on the good faith of the prosecution, but

that the prosecution has an affirmative duty to prove that the evidence it proposes to use in a given case is **"derived from a legitimate source, wholly independent from the compelled testimony."** Kastigar, *supra,* 460. The burden is "Heavy" on the prosecution to prove that they have obtained the alleged tainted evidence from a completely independent source from the compelled testimony. Therefore, once petitioners demonstrated that their compelled statements were constitutionally qualified by use immunity, the DA shouldered a "heavy burden" of proof to establish affirmatively that the immunized statements were in no way the source of any evidence adduced at the trial. *People v. Corrigan*, 80 N.Y. 2d 326, 330-332 (1992); *United States v. Schmidgall*, 25 F.3d 1533, 1536-37 (11th Cir. 1994); *United States v. McDaniel*, *supra* at 311.

Your Court has never specifically said what type of hearing is required and the federal circuits are split on affidavits versus testimony. In the instant case the New York courts relied on Loomis, *supra*, in finding that the lower court was not obligated to conduct an evidentiary hearing and affidavits were "adequate" to satisfy the prosecutors heavy burden regarding the *Kastigar* issue. Petitioners strongly disagree and submit to your Court that the instant situation requires a full-fledged evidentiary hearing in order to comply with the constitutional safeguards enumerated in *Kastigar*. Loomis, *supra* did not involve a *Kastigar* issue, rather a CPL 440.10 motion concerning defendant Loomis's contention that he received ineffective assistance of counsel. The application of Loomis, *supra,* by the New York Courts to this instant case is clearly wrong and in total disregard to the principles enumerated by your court in Kastigar, supra.

Federal courts have reached different conclusions about the type of hearing necessary. Many federal courts have interpreted Kastigar to require a full evidentiary hearing to

determine whether the government has improperly used immunized testimony. United States v. Rivieccio, 919 F.2d 812 (2nd Cir. 1990); United States v. De Diego, 511 F. 2d 818 (D.C.Cir. 1975); Semkiw, McDaniel, Hampton, Smith, *supra.* These evidentiary hearings are required to ensure that criminal defendants are not "dependent for the preservation of [their] rights upon the integrity and good faith of the prosecuting authorities." These courts requiring full evidentiary hearings seem to be responding, at least implicitly, to Justice Marshall's expressed fear that "the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence. By requiring a full evidentiary hearing, the government may be put to the task by the defendant to prove independent sources of its evidence.

In Hampton, *supra* at 1490, it was held that a prosecutor must systematically establish an independent source for each and every item of evidence which is intended to be presented at a criminal trial. As therein explained,

> .. Each step of the investigative chain by which the evidence presented was obtained must be documented or accounted for. The prosecutor who obtained the indictment may have never seen the immunized testimony and may believe in good faith that no one associated with the federal prosecution has utilized it, but that is not enough. Such disclaimer does not preclude the possibility that someone who has seen the compelled testimony was thereby led to evidence that was furnished to federal investigators. Only by affirmatively providing that his evidence comes from sources independent of the immunized testimony can the prosecutor assure that the witness is in the same position he would have enjoyed had his

> self-incrimination privilege not been displaced by a grant of immunity. United States v. Nemes, 555 F.2d 51, 55 (2d Cir. 1977); accord, United States v. Tantalo, 680 F.2d 902, 908 (2nd Cir. 1982).

Other court have not read Kastigar to require a full evidentiary hearing. These courts permit trial courts to conduct a more abbreviated examination of the prosecutor's evidence. United States v. Helmsley, 941 F.2d 71 (2d Cir. 1991); United States v. Provenzano, 620 F. 2d 985, (3rd Cir. 1980); United States v. Romano, 583 F. 2d 1 (1st Cir. 1978). Even when they allow less formal hearings, the prosecutor must do more than submit affidavits or testimony of prosecutors denying any use of the tainted testimony; they must make an affirmative showing that it derived all the evidence from independent sources.

Therefore, while an evidentiary hearing may not be initially necessary, after a preliminary review of the affidavits by the court, if there is compelling contradictory evidence in the affidavits, then the only way to resolve the discrepancies would be through a evidentiary hearing entailing the taking of live testimony. This would be the only way to fulfill the requirement of fundamental constitutional due process.

At a bare minimum the New York courts, having multiple diametrically opposed affidavits in front of them, should have ordered a testimonial post-trial *Kastigar* hearing in order to evaluate the truth, veracity, demeanor and appearance of the affiant on the stand and thereafter made a decision on the motion. Foley's affidavit is demonstrably false and inaccurate, and certainly cries out for sworn testimony. See, Seiffert, Nemes, and Hampton, *supra.* The New York courts can not under *Kastigar* law simply accept the conclusory allegations that no harm had been done to defendants. The New York courts should have allowed the

inquiry to move forward, by permitting the People's proof to be confronted and be cross-examined.

In fact, such improper application of case law in the instant situation clearly shifts the burden of proof to the defendants in complete contradiction of Kastigar, *supra*, case law. By the rulings of the New York courts in petitioner's case, this burden placed on defendants is clearly insurmountable. Therefore this Court is asked to enumerate the legal principles that should be applied in a *Kastigar* issue in New York State. This issue goes to the fundamental right to due process and fairness and by necessity requires that your Court grant leave in order to resolve this legal issue in petitioners case and set legal precedent for future *Kastigar* issues within New York State and thereby ensuring that the guidelines enumerated by your Court are followed by New York State Courts.

Finally, although the issue of timeliness in a Kastigar setting has never been addressed by a New York state court, the Federal Courts are in agreement that a trial court "may hold a *Kastigar* hearing pre-trial, post-trial, mid-trial (as evidence is offered), or it may employ some combination of these methods" Untied States v. North I, 910 F.2d 843, 854 (D.C.Cir. 1990); United States v Frumento, 552 F.2d 534, 542 n.14 (3rd Cir. 1977); DeDiego, Tantalo, *supra.* The lower courts continuously look at the newly discovered evidence in light of the original *Kastigar* hearing, without regard for the impact at trial, which required a new *Kastigar* hearing post-trial. The trial court's refusal in this case to look beyond the pre-trial *Kastigar* hearing is wrong. The petitioners in this situation, under the Constitution of the United States of America, were entitled to a post-trial Kastigar testimonial evidentiary hearing

The New York courts evidence their disdain regarding petitioners' pursuit of their constitutional rights by constantly

using words such as "rehash" and "relitigate" throughout their opinions and responses. The New York courts fail to recognize that a pretrial *Kastigar* hearing can never address a *Kastigar* trial issue, because the trial has yet to occur. In effect, the lower courts and Respondent are voicing their displeasure regarding the present appeal. In fact the attitude of the lower courts regarding this case is that once you are convicted, it is the end of the story, in essence denying petitioners their due process rights and petitioners' fundamental right to the pursuit of justice. If the lower courts' attitude is accepted, in effect the New York State court system is barring future remedies regarding *Kastigar* issues concerning newly discovered evidence that was previously unavailable, and is certainly not in conformance with the United States Constitutional legal precedent.

CONCLUSION

This case represents prosecutorial misconduct of such grave proportions that the heart of *Kastigar* has been violated, and your Court must intervene and condemn such practice. These grave issues have widespread nationwide impact concerning the crucial constitutional rights of hundreds of thousands of Police Officers throughout this country regarding compelled testimony and necessitates your Court's intervention. *Kastigar* law applicability in New York State must be in conformity with decisions rendered by the United States Supreme Court. The *Kastigar* issue is so fundamental and goes to the very integrity of the practice of compelling testimony from public servants in New York State. In petitioner's case, a testimonial evidentiary hearing is required in order to conform to the constitutional imperatives of Kastigar, supra. Granting certiorari in this case would give the Court an opportunity to address this important constitutional violation.

As former public servants, petitioners can only pray that your Court will continue to ensure that the fundamental constitutional rights of Police Officers and other public servants throughout this country are preserved and protected. Petitioners are only seeking a fair and impartial Court to correct egregious conduct that occurred throughout petitioner's case so that the truth may ultimately be revealed and what has happened to these petitioners will not happen to other Police Officers.

It is prayed that all these deficiencies can now be cured. It is thus petitioner's hope that the justice which, in their respectful view, has so long alluded them, can now be finally dispensed, in light of the magnitude of the constitutional and legal claims herein presented.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York
May 30, 2002

Respectfully submitted,

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NEW YORK STATE COURT OF APPEALS
CORRECTED CERTIFICATE DENYING LEAVE
PETITIONER PATRICIA FEERICK

State of New York, Court of Appeals
BEFORE: HON. JUDITH S. KAYE, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

-against-

CORRECTED CERTIFICATE DENYING LEAVE

Patricia Feerick,

Appellant.

I, JUDITH S. KAYE, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York , New York
March 6, 2002

"s/Judith S. Kaye"
Chief Judge

*

Order of the Appellate Division, First Department, entered October 4 , 2001, affirming a judgment of the Supreme Court, New York County, rendered July 3, 2000 and August 2, 2000.

*Description of Order:

NEW YORK STATE COURT OF APPEALS
CORRECTED CERTIFICATE DENYING LEAVE
PETITIONER ORLANDO ROSARIO

State of New York, Court of Appeals
BEFORE: HON. JUDITH S. KAYE, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

-against-

CORRECTED CERTIFICATE DENYING LEAVE

Orlando Rosario,

Appellant.

I, JUDITH S. KAYE, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York , New York
March 6, 2002

"s/Judith S. Kaye"
Chief Judge

*

Order of the Appellate Division, First Department, entered October 4 , 2001, affirming a judgment of the Supreme Court, New York County, rendered July 3, 2000 and August 2, 2000.

*Description of Order:

NEW YORK STATE COURT OF APPEALS
CORRECTED CERTIFICATE DENYING LEAVE
PETITIONER MAYRA SCHULTZ

State of New York, Court of Appeals
BEFORE: HON. JUDITH S. KAYE, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

-against-

CORRECTED CERTIFICATE DENYING LEAVE

Mayra Schultz,

Appellant.

I, JUDITH S. KAYE, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York , New York
March 6, 2002

"s/Judith S. Kaye"
Chief Judge

*

Order of the Appellate Division, First Department, entered October 4 , 2001, affirming a judgment of the Supreme Court, New York County, rendered July 3, 2000 and August 2, 2000.

*Description of Order:

NEW YORK STATE COURT OF APPEALS
CORRECTED CERTIFICATE DENYING LEAVE
PETITIONER JOHN DEVITO

State of New York, Court of Appeals
BEFORE: HON. JUDITH S. KAYE, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

-against-

CORRECTED CERTIFICATE DENYING LEAVE

John DeVito,

Appellant.

I, JUDITH S. KAYE, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York , New York
March 6, 2002

"s/Judith S. Kaye"
Chief Judge

*

Order of the Appellate Division, First Department, entered October 4 , 2001, affirming a judgment of the Supreme Court, New York County, rendered July 3, 2000 and August 2, 2000.

*Description of Order:

DECISION AND ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENTOF THE NEW YORK STATE SUPREME COURT

Williams, J.P., Mazzarelli, Andrias, Ellerin, Saxe, JJ.

4834 The People of the State of New York,
Respondent,

Sylvia Wertheimer

-against

John DeVito,
Defendant-Appellant.

Howard B. Sterinbach

4835 The People of the State of New York,
Respondent,

Sylvia Wertheimer

-against

Patricia Feerick,
Defendant-Appellant.

Pro Se

4836 The People of,the State of New York,
Respondent,

Sylvia Wertheimer

-against

Orlando Rosario,
Defendant-Appellant.

Mark M. Baker

4837 The People of the State of New York,
Respondent,

Sylvia Wertheimer

-against

Mayra Schultz,
Defendant-Appellant.

Alan Nelson

Orders, Supreme Court, New York County (Joan Sudolnik, J. and Bonnie Wittner, J.) entered July 3, 2000 and August 2, 2000, respectively, denying defendants, motions made pursuant to CPL 440.10 to, inter alia, vacate their judgments of conviction, unanimously affirmed.

Both motion courts properly concluded that the affidavits from two recently-retired supervisory police officers submitted by defendants did not constitute newly discovered evidence within the meaning of CPL 440.10(g), and that, in any event, they would not have changed the verdict, or the result of the hearings held pursuant to Kastigar v United States (406 US 441) that had been at issue on defendants' prior appeals (People v Feerick, 230 AD2d 239; People v Feerick, 241 AD2d 126, affd 93 NY2d 433).

Defendants offered no reasonable excuse for their failure to come forward with the information contained in these affidavits at an earlier date, either at trial, or at the first CPL 440.10 motion, made in 1994, when the information was unquestionably known to defendants. Indeed, the record establishes that one of these witnesses was assisting the defense at the time of sentencing. Moreover, the Police Department's disapproval, in January 1995, of the other witness's request to sign an affidavit in support of defendants, who had already been sentenced, fails to explain why the defense did not make use of the proffered evidence at trial or on the first CPL 440.10 motion.

In any event, notwithstanding defendants' arguments to the contrary, the determinations of the motion courts, that the alleged newly discovered evidence. would not have changed the result of the earlier Kastigar hearings or of the trial, is amply supported by the record. In their assertions to the contrary, defendants rehash arguments concerning the underlying Kastigar issue that this Court has previously

rejected (see, People v Feerick, 241 AD2d 126, 134-136, supra). Furthermore, one affidavit was based on hearsay and the other merely constituted impeachment evidence, and neither affiant had personal knowledge bearing on the central issue of whether the People had made use of defendants' immunized statements.

The motion courts were not obligated to hold any evidentiary hearings (see, People v Loomis, 256 AD2d 808, lv denied 93 NY2d 854). We note that Justice Sudolnik had presided over the original and reopened Kastigar hearings, and Justice Wittner had presided over defendants' trial. As the courts with the most intimate knowledge of the facts and issues and which had heard the witnesses, they properly concluded after reviewing the relevant record that the newly presented affidavits would not change their rulings.

We have considered and rejected defendants' remaining claims.

M-4743 - People v Devito, et al.

Motion to strike respondent's brief denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 4, 2001

"s/Catherine O'Hagan Wolfe"
CLERK

DECISION AND ORDER OF THE NEW YORK STATE SUPREME COURT OF THE HONORABLE JOAN SUDOLNIK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 76

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THE PEOPLE OF THE STATE OF NEW YORK

-against - Ind. No. 2303/92

PATRICIA FEERICK, MAYRA SCHULTZ, JOHN DEVITO and ORLANDO ROSARIO,
Defendants.

----------x

SUDOLNIK, J.:

On May 25, 1994, following a trial by jury, Patricia Feerick, Mayra Schultz, John DeVito and Orlando Rosario were convicted of the crimes of criminal trespass, unlawful imprisonment, coercion and official misconduct. Rosario was convicted of the additional crime of perjury and Devito was convicted of the additional crime of falsifying business records.

The judgments of conviction were affirmed by the Appellate Division on March 24, 1998 [People v. Feerick, et al., 261 AD2d 126 1st Dept. 1998)] and by the Court of Appeals on June 8, 1999 [People v. Feerick. et al., 93 NY2d 433) (1999)].

Defendants now move, pursuant to CPL 440.10(l)(b),(d),(f),(g) and (h) to dismiss the indictment and to set aside the verdicts, alleging that the prosecution made prohibited use of their immunized testimony at their PG 118-19 hearings to obtain an indictment and to secure a conviction at trial.

This claim was raised prior to trial by a motion to dismiss the indictment. It was raised again following trial by a motion to set aside the verdicts pursuant to CPL 440.10. Both motions were denied.*

Defendants now argue that they are in possession of newly discovered evidence, to wit, the affidavits of a retired police lieutenant and a retired police captain which defendants claim establish that the New York County District Attorney's Office and the New York City Police Department conspired to violate defendants' rights. Specifically, defendants claim that the District Attorney feigned a lack of interest in pursuing criminal charges against defendants in order to clear the way for the police department to proceed with the PG 118-19 hearings. This was done with the understanding that the police department would provide the District Attorney with defendants' immunized testimony which the District Attorney would then use to discover and develop evidence against defendants for use in a criminal prosecution.

Following a Kastigar hearing [Kastiga v. United States, 406 US 441 (1972)] conducted before me on April 30, May 24 and June 4, 1993, I found that the People met their heavy burden of establishing that, with the exception of information relating to Ben Stokes' arrest, they were in possession of all of the information used to obtain an indictment well before any of the defendants testified at the administrative hearings. I also found that information concerning Ben Stokes' arrest came not from Rosario's disclosure at his administrative hearing, but from the contact Stokes initiated with Det. Robert Miller after Stokes was

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* I will address defendants' claim as it relates to the motion to dismiss the indictment. That portion of the motion which seeks to set aside the verdicts will be referred for decision to the judge before whom the case was tried.

indicted on a case he believed had been resolved with the return of the police radio. Everyone with firsthand knowledge of the sequence of events leading to the reopening of the criminal investigation has been examined under oath: Det. Miller, who was called as a witness by the People at the Kastigar hearing; Deputy Inspector Joseph DeMartini, Assistant District Attorney Larry Stephen and Lt. Kim Foley, who were called as witnesses by the defense at the same hearing; and Ben Stokes, who was questioned about it at trial. The two individuals who have submitted affidavits in support of the instant motion were not involved in those events and have nothing relevant to contribute with respect to the renewed motion to dismiss.

Accordingly, defendants' motions to dismiss the indictment or, in the alternative, for a new Kastigar hearing, is denied.

The motions to set aside the verdicts on the ground that defendants' immunized testimony was used to obtain evidence for use at trial are respectfully referred to the trial judge for decision.

This constitutes the decision and order of the court.

Dated: July 3, 2000

"s/Hon. Joan C. Sudolnik, J.S.C."

Date: August 3, 2000

I hereby certify that the foregoing paper is a true copy of the original thereof, filed in my office.County Clerk and the Clerk of the Supreme Court, New York County

OFFICIAL USE

DECISION AND ORDER OF THE NEW YORK STATE SUPREME COURT OF THE HONORABLE BONNIE WITTNER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

----------X

THE PEOPLE OF THE STATE
OF NEW YORK

DECISION
AND ORDER
INDICTMENT

-against-

2303/92

Patricia Feerick, John DeVito,
Mayra Schultz and Orlando Rosario

DEFENDANT

----------X

BONNIE G. WITTNER, J.:

On May 25, 1994, all four defendants were convicted by a jury of the crimes of criminal trespass, unlawful imprisonment coercion and official misconduct. In addition Rosario was convicted of perjury and DeVito of falsifying business records. On October 3, 1994, Feerick and Rosario were sentenced. DeVito and Schultz were sentenced on October 6, 1994.[1] Prior to sentence defendants filed motions pursuant to CPL 330.30 to set aside the verdicts. Those motions were denied with leave to renew the issues raised in post-judgment motions. Defendants subsequently moved, pursuant to CPL 440.10, to set aside the judgments of conviction.

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[1] The Reply Affirmation of John Dormin, dated May 26, 2000 at para. 6 sets forth the sentence each defendant received.

The basis for those motions was defendants' claim that the People had used in the grand jury and at trial immunized testimony taken at police department administrative hearing. Prior to trial, another Justice of this Court held a hearings pursuant to Kastigar v United Scares. 406 US 441 (1972) and found that the People had established they were in possession of all the information used to obtain the indictment before any of the defendants testified at the administrative hearings in question and denied their motions to dismiss the indictment. The CPL 440 motion ("1st motion") again raised a claim that the prosecutor improperly used immunized testimony, this time at trial. In addition to attempting to relitigate the earlier Kastigar decision, defendants contended that the testimony of two trial witnesses, Sergeant Masci and Deputy Inspector Friedlieb, was somehow derived from the administrative hearing. Defendants had not objected to these witnesses at trial. The CPL 410.10 motions were denied by decision and order dated January 10, 1995. Defendants appealed their convictions and denial of the CPL 440 motions.

By decision and order dated August 29, 1996, the Appellate Division remanded for review of certain aspects of the pre-trial Kastigar hearings. The hearing court, reopened that hearing and issued a new ruling again finding that the prosecution did not derive from any evidence from defendant's immunized testimony at the administrative hearings..

The judgements of conviction and the denials of the CPL 440.10 motions were affirmed by the Appellate Division, People v Feerick. 261 A.D.2d 126 (1st Dept. 1998) and by the Court of Appeals, People v Feerick. 93 N.Y.2d 433 (1999). Regarding the use of immunized testimony, the Court held that "the claims of a ....Kastigar violation at trial, based on documents and facts which were unquestionably know to the defendants at the time, were not raised at trial where the court could have addressed these issues, and they are thus

unpreserved for our review [emphasis supplied] [citations omitted]." People v Feerick. 93 N.Y.2d at 452.

Defendants move once again, pursuant to CPL 440.10 (1)(b)(d)(f)(g) & (h) ("2nd motion"), to dismiss the indictment and to set aside the judgments, repeating their claim that the prosecution made use of their immunized testimony in securing both the indictment and the convictions at trial. The claims relating to Friedlieb and Masci were raised in the 1st motion which was denied since defendants did not object to their testimony at trial. See. Id.

Defendants allege they now have newly discovered evidence showing that the police and the prosecutor conspired to obtain information at the administrative hearings which would then be used to develop a criminal case against them at trial. In specific, they argue that the Fridlieb, Masci and Stokes testimony was unconstitutionally derived from this illegal agreement. That portion of the motion which relates to the motion to dismiss the indictment has been denied in the accompanying decision, dated July 3, 2000, of the judge who ruled on the initial motion to dismiss. For the reasons set forth in that decision, the motions to vacate the judgments of conviction based on a Kastigar violation are also denied.

Newly Discovered Evidence

The allegedly newly discovered evidence consists of affidavits from two retired police officers. One of these individuals, former officer Carmody, alleges that a police investigator told him, in March 1992, that she agreed with an assistant district attorney to proceed with the administrative hearings against defendants creating the impression that the district attorney had no interest in pursuing criminal charges. She would then provide the prosecutor with the descendants' immunized testimony from those hearings so he could pursue such charges. The other affiant merely provides speculative

impeachment evidence. Neither affidavit reveals any newly discovered evidence within the meaning of CPL 440.10.

A criminal conviction may be vacated on the basis of allegedly newly discovered evidence if the evidence 1) will probably change the result if a new trial is granted; 2) is discovered since the trial, 3) could not have been discovered prior to the trial with the exercise of due diligence, 4) is material to an issue at trial, 5) is not cumulative and 6) is not merely impeachment. CPL 440.10(l)(g), People v Reves. 255 A.D.2d 261 (1st Dept. 1993). The testimony of the affiants here was available in 1994 prior to trial. No explanation is given for the failure to obtain that evidence six years ago. In any event the information in the affidavits does not materially chance the facts upon which the earlier denial of the CPL 440 motions was based. Defendants presented entirely exculpatory statements at their administrative hearings. Their repeated claims of use of this testimony to derive evidence used against them are all the more meritless since the prosecutor not only did not, but could not have developed a case based on the defendants' immunized version of the incidents in question. In any event, in the initial and reopened Kastigar hearing, the prosecution showed that they had all the evidence for a grand jury presentation long before the defendants testified at the administrative hearings in January and March of 1991. Thus, even if the Carmody affidavit were credited, it would establish no more than an agreement to use, not the actual use of, immunized testimony to secure the criminal convictions. The mere existence of such an agreement is irrelevant where no such testimony was actually used improperly.

Finally, the second affiant was available prior to trial and, in any case, his evidence would not likely have changed the verdict. CPL 440.10(I)(g).

The motion to set aside the judgments is denied pursuant to CPL 440.10(3)(a)(b)(c).

August 2, 2000
New York, New York

"s/BONNIE G. WITTNER, J.S.C."

Date: August 3, 2000
I hereby certify that the foregoing paper is a true copy of the original thereof, filed in my office.

County Clerk and the Clerk of the Supreme Court, New York County.

OFFICIAL USE.

CERTIFICATE GRANTING LEAVE TO APPEAL TO THE APPELLATE DIVISON, FIRST DEPARTMENT, OF THE NEW YORK STATE SUPREME COURT

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT
BEFORE: Hon. Ernst H. Rosenberger
Justice of the Appellate- Division

---------- X

The People of the State of New York, Respondent — M-5078 M-5095, Ind. No. 2303/92

-against-

Patricia Feerick, Orlando Rosario, Mayra Schultz and John Devito, Defendants-Appellants. — CERTIFICATE GRANTING LEAVE

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I, Ernst H. Rosenberger, a Justice of the Appellate Division, First Judicial Department, do hereby certify that in proceedings herein questions of law or fact are involved which ought to be reviewed by the Appellate Division, First Judicial Department, and, pursuant to Section 460-15 of the Criminal Procedure Law, permission is hereby granted to the above-named defendants to appeal to the Appellate Division, First Judicial Department, from the orders of the Supreme Court, New York County, entered on or about July 3, 2000 and August 2, 2000, respectively.[1]

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[1] In the event defendant has an existing (direct) appeal from a judgment, such appeal shall be consolidated with the appeal from the aforesaid order; and any poor person relief granted with respect to the appeal from the judgment shall be extended to cover the appeals so consolidated.

Dated: New York, New York
December 21, 2000

"s/Ernst H. Rosenberger"
Justice of the Appellate Division

NOTICE: Within 15 days from the date hereon, an appeal must be taken, and this certificate must be filed with the notice of appeal. An appeal is taken by filing, in the Clerk's office of the criminal court in which the order sought to be appealed was rendered, a written notice in duplicate that appellant appeals to the Appellate Division, First Judicial Department (Section 460.10, subd. 4, CPL), together with proof that another copy of the notice of appeal has been served upon opposing counsel. The appeal (or consolidated appeals; see footnote) must be argued within 120 days from the date of the notice of appeal, unless the time to perfect the appeal(s) is enlarged by the court or a justice thereof.

DECISION AND ORDER OF THE NEW YORK STATE QUEENS COUNTY SUPREME COURT OF THE HONORABLE CHARLES J. THOMAS

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF QUEENS : PART 13

----------X

THE PEOPLE OF THE STATE OF NEW YORK
EX REL. ORLANDO ROSARIO
Realtor,

-against-

GLENN S. GOORD, COMMISSIONER,
NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES, et ano.

----------X

THE PEOPLE OF THE STATE OF NEW YORK
EX REL. JOHN DeVITO, Realtor,

-against-

BERNARD KERIK, COMMISSIONER, NEW
YORK CITY DEPARTM ENT OF CORRECTION,
Respondents.

----------X

THE PEOPLE OF THE STATE OF NEW YORK
EX REL. PATRICIA FERRICK,

-against-

GLENN S. GOORD, COMMISSIONER,
NEW YORK STATE DEPARTM ENT OF
CORRECTIONAL SERVICES, BRIAN
FISCHER, SUPERINTENDENT, QUEENS
BORO CORRECTIONAL FACILITY,
Respondents.

----------X

BY: CHARLES J. THOMAS, J
DATE:12/30/99
SPECIAL PROCEEDING NO. 21709/99
WRIT OF HABEAS CORPUS

Orlando Rosario, John DeVito and Patricia Feerick petition this court for a Writ of Habeas Corpus or, in the alternative, a CPL 440.10 hearing.

Originally, petitioner Rosario sought a Writ. He was joined by DeVito and ultimately by Feerick. Since the parties are codefendants under New York County Indictment No. 2303/92, the applications have been consolidated on the consent of all parties for the purpose of decision.

Petitioners allege that their convictions resulted from the improper use of Administrative Patrol Guide Section 118-9 Kastigar testimony. Basically, it is maintained that the prosecution and police agreed to utilize, and did use, petitioners' immunized statements in an illegal fashion which secured their convictions in whole or substantial part.

I

BACKGROUND

On the morning of September 26, 1990, Police Lieutenant Feerick and Police Officers DeVito and Rosario and a fourth officer, not involved in this proceeding, went to an apartment building in the Taino Tower complex in upper Manhattan to try to recover a radio, which had been lost several days earlier. The police officers pushed their way into two apartments, ransacked both and unlawfully detained Denise Jackson, Theresa Johnson, Maribel Delgado and Ben Stokes. These residents were threatened with arrest and other repercussions if they did not cooperate in helping to find the missing radio.

While searching the second apartment in which Stokes resided, the officers found 591 vials of crack cocaine and told him that they would not prosecute in exchange for the return of the radio. Officer DeVito, back at the precinct, vouchered the vials of crack, falsely stating on official forms that they

had been recovered in the alleyway behind the building, where Stokes had dropped them while running away to avoid arrest. Later that same day, an unidentified person turned the radio over to the building personnel who returned it to the police.

After the police left, Jackson called 911 and reported the incident. Detective Robert Miller of the Internal Affairs Division (IAD) began an investigation which continued for approximately three months. Miller kept the District Attorney's Office apprised of case developments. Stokes was interviewed, but would not cooperate in any prosecution. By letter dated January 7, 1991, the District Attorney's Office declined to prosecute the petitioners, but urged the Police Department to follow up with appropriate disciplinary action.

Pursuant to Patrol Guide Section 118-9, which requires a member of the police force to respond to questions under penalty of dismissal, hearings were held during the latter part of January, 1991 for all four police officers. Feerick's hearing was on January 17, 1991; Rosario's on January 18, 1991 and DeVito's hearing was conducted on January 24, 1991. Feerick was questioned a second time on March 27, 1991 about related events, but not about her actions on September 26, 1990.

At the hearings, each officer was represented by counsel and each gave essentially the same statement, denying any wrongdoing.

At his January 18, 1991 hearing, Rosario stated that he had arrested Stokes on January 5, 1991 for the drugs recovered on September 26, 1990 and had also testified before the Grand Jury on January 11, 1991 regarding that arrest. Stokes tried to contact Miller on January 18, 1991 and ultimately agreed to cooperate with any prosecution. He explained that his change of mind was due to petitioners

violating their agreement with him - no drug arrest if the radio was returned. Once the District Attorney's Office was advised of these recent developments, the investigation was reopened and culminated in a 30-count indictment against petitioners.

Prior to trial, The Honorable Joan Sudolnick held a Kastigar hearing to determine whether the People had made use of any information from the Section 118-9 hearings. Three months prior to this hearing, the People turned over to defense counsel an index of the work sheets prepared mostly by Miller in connection with the IAD investigation, and included a brief description of its contents. Of the 144 documents, defense counsel requested 127 which were all the pre-indictment work sheets. The court reviewed several of these documents in camera and found that three items be disclosed as Rosario material for the hearing. An additional two work sheets were also turned over by the People. After having heard evidence from Miller, who was the People's sole witness, as well as three defense witnesses, the hearing court found that the People had met their burden of demonstrating that the criminal prosecution was based on sources independent of defendant's Administrative Section 118-9 testimony and denied the motion to dismiss the indictment.

After a jury trial, each petitioner was convicted of four counts of second degree unlawful imprisonment, one count of second degree unlawful imprisonment, one count of second degree coercion, one count of second degree criminal trespass (except Feerick, convicted of two counts) and one count of official misconduct (except Feerick and DeVito, convicted of two counts). DeVito was also convicted of falsifying business records in the first degree. Rosario was also found guilty of perjury in the first degree for his Grand Jury testimony regarding Stokes' drug arrest. The Honorable Bonnie Wittner presided at trial and sentence. Petitioners I attorneys moved

after sentence to vacate the judgments of conviction pursuant to CPL 440.10 which was denied by the court.

Petitioners appealed both their judgments of conviction and denial of the CPL 440.10 motion.

The Appellate Division held the appeals from the judgments of conviction in abeyance (230 AD2d 689) in order for the hearing court to determine if certain documents constituted Rosario material and, if necessary, take additional evidence and make a de novo Kastigar ruling. That order also reversed the denial of the CPL 440.10 motion since the same Kastigar/Rosario claim was raised therein.

In a de novo ruling dated February 3, 1997, the hearing court again concluded that neither the prosecution nor the police had made prohibited use of the immunized testimony to secure the indictments.

On March 24, 1998, the Appellate Division First Department affirmed the judgments of the Supreme Court regarding the Kastigar hearing court and the Judgments and sentences of the trial court. (People v Feerick, 241 AD2d 126.) The Appellate Division also noted that in regard to the issue of Kastigar violations in connection with the trial, defendants' CPL 440.10 motion was properly denied. (People v Feerick, supra, at p. 135.)

Petitioners then appealed to the Court of Appeals and the order of the Appellate Division was affirmed on June 8, 1999. (People v Feerick, 93 NY2d 433.)

II
PETITIONERS' APPLICATION

The petitioners, former police officers, were charged with multiple violations of the law arising out of entry into two apartments in their search for a missing police radio. Two investigations were initiated to discover exactly what happened on the day in question. The first was undertaken by the District Attorney's Office to determine if there was a basis to indict for criminal violations; the second was conducted by the New York Police Department Internal Affairs Division to determine if administrative sanctions should be imposed. Following an investigation by the New York County District Attorney's Office, the District Attorney's Office notified the Internal Affairs Division on January 7, 1991 their office would not prosecute the petitioners and that the Police Department should pursue the appropriate disciplinary action against them. In light of this decision, the Police Department commenced administrative proceedings. Part of such proceedings was a Patrol Guide Section 118-9 hearing which requires a member of the police force to respond to questions under penalty of dismissal. All petitioners took a hearing. The law regarding such a departmental hearing and the statements that flow from it were summarized in Peolple v Corrigan, 80 NY2d 326, 329:

> "Under both the State and Federal Constitutions, a statement made under threat of dismissal is protected by the privilege against self-incrimination and automatically immunized from use in criminal proceedings (see, Matter of Matt v Larocca, 71 NY2d 154, 159; Lefkowitz v Turley, 414 US 70, 79) . The immunity attaching to a compelled statement bars the People from using in any way the statement itself or any evidence derived directly or indirectly from it (see, Matter of Matt v Larocca, supra; Kastigar v United States, 406 US 441, 453). After the People are made

> aware of the fact that a defendant has made an immunized statement, the People bear the burden of establishing that any evidence used was derived from a source wholly independent of the statement (see, Braswell v United States, 487 US 99, 117; Kastigar v United States, supra, at 460-462; see also, United States v North, 910 F2d 843, 853-855; United States v Serrano, 870 F2d 1, 14-15)."

The petitioners, application for a Writ of Habeas Corpus is submitted on the grounds that petitioners are illegally imprisoned in that:

> "petitioner now has evidence, in affidavit form, to the effect that there existed an illegal and improper agreement by and between a ranking officer of the NYPD's Internal Affairs Division and an Assistant District Attorney . . . in the New York County District Attorney's Office to commingle and share evidence obtained by the NYPD, pursuant to§ 118-9 of the NYPD Patrol Guide, which provides a constitutional and statutory grant of immunity to petitioner and her co-defendant officers that their testimony or its fruits would not be used to criminally prosecute them."

Further, petitioners maintain that the District Attorney's decision to prosecute the police officers was derived, either in whole or in part, from the illegal use of such departmental testimony.

III
The Applicable Law

The petitioners seek habeas corpus relief on the theory that an important police official witness will now present relevant testimony indicating that there existed an illegal

agreement to share evidence between the police department and the New York District Attorney's office and in so doing violate Petitioners' Fifth and Fourteenth amendment rights.

Petitioners base their habeas corpus proceeding on People ex rel. Keitt v McMann, 18 NY2d 257, 262 which states:

> "that habeas corpus is an appropriate proceeding to test a claim that the relator has been imprisoned after having been deprived of a fundamental constitutional or statutory right in a criminal prosecution, including, but not limited to, the right to be tried and sentenced by a court having jurisdiction over the charge and the person"

However, a review of the law establishes that while a Habeas Corpus proceeding is a procedural tool "of ... great flexibility and vague scope" (People ex rel. Keith v McMann, supra at 263) it is well settled that the writ may not be used if the issues raised in the proceeding

> "could have been reviewed either on direct appeal from the judgment of conviction or on a motion pursuant to CPL article 440 to set aside the judgment... (see, People ex rel. Benbow v Scully, 189 AD2d 844; People ex rel. Jackson v Scully, 183 AD2d 799; People ex rel. Reath v Riley, 171 AD2d 768" (People ex rel. Smith v Hanslmaier, 237 AD2d 473).

As regards this witness and the issues presented, the record indicates that he was not called in the first Kastigar hearing and the issue of a deliberate agreement to breach the departmental wall of silence was not presented. In the reopened Kastigar hearing, the court refused to expand the hearing by calling an "unnamed police official" as a witness.

The Appellate Division (People v Feerick 241.AD2d 126, 124) held that "no Kastigar violation occurred in securing the indictment" and also the Kastigar issue was not raised at trial when witnesses testified (p 135).

The Court of Appeals in People v Feerick, 93 NY2d 433, 452) noted the fact that "a high-level mystery witness from the Police Department had something relevant to contribute, without more, was insufficient to threaten this conclusion". The conclusion referred to the re-opened Kastigar hearing which had ruled that additional witnesses were beyond the scope of the remanded hearing (p 452 - 453). Further it affirmed the Appellate Division that since Kastigar violations were not raised at trial "they are thus unpreserved for our review (p 452)".

Analyzing the above, the record indicates that the allegations set forth in the Carmody affidavit were never legally considered either by the hearing or trial court in the petitioner's case since the witness never appeared to testify. As this evidence was never presented, it appears that the petitioners have valid grounds for a hearing under CPL 440.10 to vacate judgment. Indeed the People have conceded this, pointing out with commendable candor in the Rosario Memorandum Of Law (p 2-4), that the Carmody affidavit does furnish a basis for a CPL 440.10 motion, either under the grounds of newly discovered evidence or constitutional violations. However, since Petitioners have grounds for CPL 440 relief, habeas corpus is not an appropriate remedy (People v Smith, supra.

Nor does this court have the power to convert this Writ into a CPL 440.10 motion and rule on the issues since CPL 440.10 (l) restricts the vacating of judgment to the court which entered judgment, which would be New York County (see

also, Matter of Pirro v Cirigliano, 226 AD2d 465; affd 88 NY2d 1033).

However, in light of the fact that the Petitioners, for the most part, have been convicted of misdemeanors and started service of sentence, further delay might nullify any relief, and also since the New York County District Attorney's Office has conceded that a CPL 440 hearing is appropriate in this case, this court will expediously set the matter down for a CPL 440.10 hearing. Said hearing will be held in the court in which judgment was entered pursuant to CPL 440.10 (l).

The application for a Writ of Habeas Corpus is denied as to reversal of conviction, however, it is granted to the limited extent that a CPL 440.10 hearing will be held in New York County based on the issues raised by former Officer Matthew J. Carmody's affidavit.

Judgment entered accordingly.

The Clerk of the Court is directed to mail a copy of this memorandum and judgment to petitioners' place of incarceration, to the petitioners' attorneys, to the New York County District Attorney and the Queens District Attorney.

"s/CHARLES J. THOMAS"
CHARLES J. THOMAS, J.S.C

AFFIDAVIT OF RETIRED CAPTAIN
MATTHEW J. CARMODY
DATED AUGUST 25, 1999

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

MATTHEW J. CARMODY, being duly sworn, deposes and says:

1. Your deponent is a retired Captain formerly employed by the New York City Police Department ("NYPD"). I served the NYPD and the City of New York for sixteen years before my retirement on March 31, 1998. I was appointed to the position of Police Officer on January 26, 1982. I was thereafter promoted to the rank of Sergeant on or about February 3,1987. Thereafter, I was promoted to the rank of Lieutenant on or about February 23, 1990. I was thereafter promoted to the rank of Captain on or about August 27, 1993.

2. From October 1989 to July 1993, I was assigned as a supervisor in the NYPD's Internal Affairs Division's Manhattan South Field Internal Affairs Unit ("MSFIAU").

3. In or about March 1992, Lieutenant Kim Foley was transferred to MSFIAU from the Manhattan North Field Internal Affairs Unit.

4. At or about the same time Lieutenant Foley arrived at MSFIAU, Lieutenant Patricia Feerick and three Police Officers assigned to the NYPD's 25th Precinct in northern Manhattan including Police Officer Orlando Rosario, were indicted by a Grand Jury in New York County for various charges, including Official Misconduct and Criminal Trespass As Lieutenant Foley had just transferred from Manhattan

North FIAU, which I knew conducted the investigation of the officers, I inquired about the case involving Lieutenant Feerick and the other officers.

5. Lieutenant Foley explicitly informed me that during the investigation of these officers by Mathattan North FIAU, which Lieutenant Foley was supervising, Lieutenant Foley had made an agreement with the Assistant District Attorney prosecuting the case, Larry Stephen, to the effect that (1) the New York County District Attorney's Office would provide the NYPD with a letter ostensibly notifying the NYPD that the D.A.'s Office was declining prosecution of the officers, and "suggesting" that the NYPD proceed with administrative interrogations of the officers pursuant to NYPD Patrol Guide §118-9, and (2) that Lieutenant Foley would then surreptitiously notify the D.A.'s Office if she received any information in the P.G. 118-9 interrogations that might be useful to the D.A.'s Office. It was clear to me throughout Lieutenant Foley's description to me of this agreement that it was an improper and illegal agreement.

6. In my experience as an IAD supervisor it was rare for the D.A.'s Office to provide NYPD investigators with letters indicating that they were not prosecuting an officer and to proceed with administrative interrogations.

7. Subsequently, while assigned to MSFIAU, Lieutenant Foley again attempted this tactic in another investigation. Your deponent objected to such improper tactics and informed Lieutenant Foley that such tactics would not be tolerated in MSFIAU.

8. Your deponent is available to testify to the above should the Court deem that necessary. Your deponent was available

to testify to the above at all times but was never given the opportunity.

"s/MATTHEW J. CARMODY"
MATTHEW J. CARMODY

Duly sworn to be this 25 Day of August 1999
"s/John Pletsch"
NOTARY PUBLIC
John Pletsch
Notary Public State of Nw York
Orange County
Cmmission Expires 12-7-2000

AFFIDAVIT OF RETIRED LIEUTENANT JOHN COMPARETTO DATED APRIL 14, 2000

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART

----------x

THE PEOPLE OF THE STATE OF NEW YORK,

-against -

AFFIDAVIT
Indictment No. 2303/92

PATRICIA FEERICK, ORLANDO ROSARIO, JOHN DEVITO and MAYRA SCHULTZ,

Defendants.

----------x

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

JOHN COMPARETTO, being duly sworn, deposes and says:

1. Your deponent is a retired Lieutenant, formerly employed by the New York City Police Department ("NYPD"). I first joined the NYPD in December of 1973 and retired in December of 1999. I was appointed to the position of police officer in or about December 1973. I was thereafter promoted to the rank of Sergeant in or about October 1984. Thereafter I was promoted to the rank of Lieutenant in or about November 1989. From November 1989 to December 1990 I was assigned to Manhattan North Narcotics District. From December 1990 to December 1991, I was assigned to the Narcotics Borough Bronx.

2. I submit this affidavit to clarify when I first was contacted by Lieutenant Kim Foley regarding a search warrant that was executed by members of my command on September 26, 1990 in the Tiano Towers complex.

3. In September 1990 I was assigned to Manhattan North Narcotics, which was responsible for investigating illegal narcotics activity in Patrol Borough Manhattan North.

4. On September 26, 1990 members under my command executed a search warrant in the Tiano Towers complex.

5. During the time period I was assigned to Manhattan North Narcotics, I did not speak with Lieutenant Kim Foley of Manhattan North FIAU regarding the execution of the September 26, 1990 search warrant at the Tiano Towers complex.

6. In December 1990, I was transferred to Narcotics Borough Bronx and assigned to that unit until December 1991.

7. While I was assigned to Narcotics Borough Bronx, I had a conversation with Lieutenant Foley of Manhattan North FIAU.

8. This conversation occurred in late January, early February 1991.

9. The focus of this conversation with Lieutenant Foley concerned the warrant that was executed on September 26, 1990.

10. To summarize, I did not confer with Lieutenant Kim Foley regarding the search warrant that was executed on September 26, 1990, within several days after the search warrant was

executed. The conversation that I had occurred while I was assigned to Bronx Narcotics, several months later.

11. On December 15, 1994 I had requested to sign the attached affidavit, but was not permitted per Janet J. Lennon, the Deputy Commissioner of Legal Matters for the New York City Police Department. She wrote "the signing of this affidavit by Lieutenant Comparetto in support of a convicted felon is not in the best interests of the Department. Further, Lieutenant Comparetto should be instructed that it is inappropriate for him to represent to any party that his statements in this matter are provided on behalf of the New York City Police Department."

12. Your deponent is available to testify whenever the court deems necessary.

Dated: New York, New York
April 14, 2000

"s/JOHN COMPARETTO"
John Comparetto

Sworn to before me this 14th day of April, 2000
"s/DAVID LENEFSKY"
Notary Public

DAVID LENEFSKY
Notary Public, State of New York
No. 02LE4620219
Qualified In New York County
Commission Expires 10/31/00

AFFIDAVIT OF LIEUTENANT KIM FOLEY
DATED NOVEMBER 29, 1994

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 66

----------X

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

AFFIDAVIT
Indictment No.
2303-92

PATRICIA FEERICK,
ORLANDO ROSARIO,
JOHN DEVITO and
MAYRA SCHULTZ,

Defendants.

----------X

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

LIEUTENANT KIM FOLEY, of the New York City Police Department, being duly sworn, affirms under penalty of perjury that:

1. I am a Lieutenant in the New York City Police Department, with over ten years of service, currently assigned to Narcotics Borough Bronx.
2. I make this affidavit to describe when I first learned of defendant Patricia Feerick's contact with Manhattan North Narcotics Division in relation to the above-captioned case.

3. In September of 1990, I was assigned to Manhattan North Field Internal Affairs Unit which was responsible for the investigation of police misconduct within Patrol Borough Manhattan North.

4. On September 26, 1990, my unit was assigned the investigation of an allegation of police misconduct made by Denise Jackson who alleged, in part, that uniformed officers had searched her apartment without consent and had destroyed and stolen her property.

5. Detective Robert Miller and other officers under my command investigated Ms. Jackson's complaint. Based on the information she provided, the investigators believed that the officers about whom she complained were assigned to the 25th police precinct.

6. Within a few days after our unit received Ms. Jackson's complaint, my supervisor, Deputy Inspector Joseph DeMartini, told me that he learned that Manhattan North Narcotics Division ("Narcotics") had executed a search warrant in an apartment within Taino Towers at about the same time as the complaint under investigation. D.I. DeMartini instructed me to contact Narcotics and ascertain the location where the warrant was executed.

7. I called Lieutenant John Comparetto of Narcotics and inquired into warrants executed in the Taino Towers complex on or about September 26, 1990. Lieutenant Comparetto informed me that a woman arrested in the 25th precinct had provided information concerning narcotics crimes. Lieutenant Comparetto further informed me that members of his command had obtained a search warrant for a building within the Taino Towers complex.

8. I also learned from Lieutenant Comparetto that Sergeant Robert Masci, who also worked for Narcotics, had interviewed the woman in order to obtain the search warrant. Lieutenant Comparetto told me that Lieutenant Feerick had asked Sergeant Masci to look for the radio during his search. I

was also told by Lieutenant Comparetto that Sergeant Masci's team executed the warrant on the evening of September 26, 1990, but did not find either the missing radio or any narcotics.

9. To summarize, within several days after Ms. Jackson's complaint, I learned from Lieutenant Comparetto that on or about September 25, 1990, an informant provided information about narcotics crimes in Taino Towers, and that Narcotics obtained a search warrant. I also learned that Lieutenant Patricia Feerick asked Narcotics to look for the missing radio during execution of the warrant. Narcotics executed the search warrant, but in an apartment and building entirely different from Ms. Jackson's.

Dated: New York, New York
November 29, 1994

"s/KIM FOLEY"
KIM FOLEY

Sworn to before me
this 29 day of November, 1994
"s/GLADYS BURTON"
Notary Public

GLADYS BURTON
Notary Public. State of New York
No. 41-4760109
Qualified in Queens County
Certified in New York County
Commjssion Expires August 31, 1996

WORKSHEET #59
DATED MONDAY JANUARY 28, 1991

INVESTIGATING OFFICER'S REPORT
PD 313-153 (Rev. 2-87)-31

From: Detective Robert Miller Command PBMN FIAU
Case Number 90-355 Complaint Number_____Other_____
Accompanying Investigator(s) Lieutenant Foley, Sergeant Holze
Case Investigator:_____ Command _____

Subject: INVESTIGATE IAD LOG # 10251/PRECINCT RECORDS AND MNN RECORDS SEARCH

Time 1725 - 1900 Hours Date: 1/28/91

Assigned with Sgt. Holze, responded to the 25th Precinct relative to investigation of Arrest conducted by members of the SNEU Team on the 25th of September 1990. The command Arrest Index on Page 13, list four (4) arrest by Officers Puglisi and DeVito, for CPCS at 1630 Hours. A search of the Command log, has the following entries under an 1630 Hour entry, Arrest information;

PO DeVito #1- Laurance, JoAnne, F/B/32 of 221 East 122nd Street apt # 2503, arrested 122nd St, 2-3rd Avenues
#2- Henix, Darnice, F/B/25 of 2370 2nd Avenue Apt# 16D arrested 121st Street 2nd Avenue.

PO Puglisi #1- Dodson, Ophelia, F/B/37 of 879 Dumont Ave. Bklyn arrested F/O 221 East 122nd Street

#2- Butler, George, M/B/31 of 621 Marida Street Bx, apt# 52, arrested F/O 221 East 122nd Street.

Additionally:
PO Riello, #1- Freeman, Desiree, F/B/20 of 2283 2nd Avenue # 1105 arrested F/O 221 East 122nd Street.

Also Submitted is a copy of the Sept. 25, 1990 Roll Call, 2nd Platoon. And copies of the Command log, which reflect the Overtime request of members of SNEU for the subject date and tour.

Time Spent	Vehicle(s)	Expenses Incurred
Cler. 90 min	Dept. No. 8351	None
Observa._____	Pvt. No. _____	_____
Interv. _____		
Travel: _____		
Invest Off.		

Rank & Sign "s/Det Robert Miller" Supr. "s.Lt. Kim E. Foley"
Det. Robert Miller

WORKSHEET #60
DATED MONDAY JANUARY 28, 1991

INVESTIGATING OFFICER'S REPORT
PD 313-153 (Rev. 2-87)-31

From: Detective Robert Miller Command PBMN FIAU
Case Number 90-355 Complaint Number _____ Other_____
Accompanying Investigator(s) Lieutenant Foley
Case Investigator:_____ Command _____

Subject: INVESTIGATE IAD LOG # 10251/ CONFERRAL WITH MAN. NORTH NARCO

Time 1800 - 1900 Hours Date: 1/28/91

Lt. Foley, contacted Detective Mladaich, Man. North Narcotics Nitro. Det Maldaich stated that their records reflect that there were two (2) arrest made by 25th Pct SNEU at 221 East 122nd Street on Sept. 25, 1990 #1- Ophelia Dodson and #2- James Mc Catherine. There was no records of any debriefing of these prisoners by members of Manhattan North Narcotics.

Additionally there were no search Warrants executed by Man. North Narco on September 26, 1990, at the subject loaction.

Time Spent	Vehicle(s)	Expenses Incurred
Cler. 45 min	Dept. No. ____	_____
Observa._____	Pvt. No. _____	_____
Interv. _____		
Travel: _____		
Invest Off.		

Rank & Sign "s/Det Robert Miller" Supr. "s.Lt. Kim E. Foley"
Det. Robert Miller

WORKSHEET #63
DATED TUESDAY JANUARY 29, 1991

INVESTIGATING OFFICER'S REPORT
PD 313-153 (Rev. 2-87)-31

From: Lt. Kim Foley Command PBMN FIAU
Case Number 90-355 Complaint Number _____ Other_____
Accompanying Investigator(s) _____
Case Investigator:Det. R. Miller Command PBMN FIAU
Subject: Allegation that MOS searched and ransacked an apartment
Time 1300 Hours Date: 1/29/91

On this date D.I. Demartini conferred with Det. Rosario of MN Narcotics regarding the issuance and execution of a search warrant on 9/26/90, copy attached. Det. Rosario stated that Sgt. Masci of MN Narco was contacted by the 25 pct on 9/25/90 to debrief a prisoner who had information regarding narcotics and possibly the lost walkie talkie. Sgt. Masci with other members of MN Narco responded to 100 Centre St, Manhattan Criminal Court, to debrief this individual and based on the information received, this individual was registered as an informant and a search warrant #609/1990 was issued. It should be noted that the warrant was for apt 3205, 2383 2nd Ave, a different apartment and building in Taino Towers. Warrant executed without results.

Time Spent	Vehicle(s)	Expenses Incurred
Cler. ____	Dept. No. ____	_____
Observa._____	Pvt. No. _____	_____
Interv. _____		
Travel: _____		

Invest Off.
Rank & Sign "s/Lt. Kim E. Foley"" Supr. "s.D.I. DiMartini"

WORKSHEET #68
DATED WEDNESDAY FEBRUARY 6, 1991

INVESTIGATING OFFICER'S REPORT
PD 313-153 (Rev. 2-87)-31

From: Lt. DORIAN IRIZARRY Command PBMN FIAU
Case Number 90-355 Complaint Number _____ Other_____
Accompanying Investigator(s) Sgt. Jose Romero_____
Case Investigator:Det. Robert Miller Command _____
Subject: _____
Time 1130 Date: Wednesday 2/6/91

Present at the Organized Crime Investigation Division to obtain the identity of a confidential informant who allegedly has information relative to this investigation. Only a perusal of the file was authorized which yielded the following:

on 9/26/90, Tawana Smith, DOB- 12/24/68, of Manhattan, telephone was interviewed by members of MNND with the intention of registering her as a confidential informant. She supplied information, which was used to obtain a search warrant, that later proved to be unreliable and therefore denied C.I. status. Smith also stated that she knew someone in the 25th precinct who possessed a department portable radio, but had no knowledge of police corruption.

Smith's aliases are: Tanya Clover, Charlene Jones, Charlene Clover, Kim Smith and Deseree Freeman

Attached are the file polaroids of Smith.

Time Spent	Vehicle(s)	Expenses Incurred
Cler. 20 mins	Dept. No. 8351	None
Observa.	Pvt. No.	
Interv. 10 mins		
Travel:		

Invest Off.
Rank & Sign "s/Lt. Irizarry" " Supr. "s.unidentifiable"

WORKSHEET #70
DATED MONDAY, FEBRUARY 11, 1991

INVESTIGATING OFFICER'S REPORT
PD 313-153 (Rev. 2-87)-31

From: Detective Robert Miller Command PBMN FIAU
Case Number 90-355 Complaint Number _____ Other_____
Accompanying Investigator(s) Sergeant William Harvey
Case Investigator:_____ Command _____
Subject: INVESTIGATE IAD LOG # 10251/INTERVIEW WITNESS
Time 1000-1235 Hours Date: Mon 2/11/91

Assigned with Sgt. Harvey, responded to Rikers island Building 11, to interview the witness Deseree Freeman, relative to her arrest by members of the 25th Precinct SNEU Team on Sept. 25, 1990. On the subject date she was arrested after exiting building #4 Taino Towers, 2383 2nd Avenue, from some where on the 32nd or 31st floor apartment # 3205 or 3105.

She was taken to the 25th Precinct where she was questioned by a tall white female about a missing Police Department radio. She informed the female that while inside building #4, she heard a police department radio from somewhere in the apartment. The white female informed her that her only concern was regarding the police radio, and in exchange for her cooperation would apprise the DA of her cooperation. The female questioned her about others present inside the apartment and asked if she knew Ben, whom she described. She informed her that a male known to her as Ben, was present in the apartment, and had information, re: the radio which she stated was in building #4, on second avenue. She stated that she exited the elevator on the 29th floor and

walked up stairs to the apartment which she thought was aparment #3205, but stated it could have been 3105.

She was debriefed by Officer Moraiz, of the Narcotics Division, regarding the contents of the apartment.

She had no knowledge of any narcotics activity inside 221 East 122nd Street, nor did she have any knowledge of Ben's residence. She stated she would be confined thereat until May 24, 1991 and agreed to further interviews.

Time Spent	Vehicle(s)	Expenses Incurred
Cler. 15 mins	Dept. No. 8402	None
Observa.	Pvt. No.	
Interv. 45 mins		
Travel:		

Invest Off.
Rank & Sign "s/Det Robert Miller" Supr. "s.Lt. Kim E. Foley"
Det. Robert Miller

INDEX SHEET OUTLINING ENTIRE INVESTIGATION

INDEX SHEET

C#_____
MNFIAU # 90-355
LOG # 90-10251

INVESTIGATOR: Det. Robert Miller
SUPERVISOR: Lt.Kim Foley
SUBJECT: Investigation of IAD LOG # 90-10251

W.S.#	DATE	REMARKS
1	9/26/90	Index sheet listing worksheets
2	9/26/90	Interview complt. D. Jackson
3	9/26/90	Canvas interview building security
4	9/26/90	Notifications telephone # check
5	9/26/90	25th Pct Records
6	9/26/90	Communications records Search
7	9/26/90	Interview Witness T. Johnson
8	9/27/90	Interview Build Sec Officer
9	9/27/90	Photo Lineup Showing to Complt.
10	9/27/90	Personnel Records SNEU Unit
11	9/27/90	ARCS Roll Call Search
12	9/28/90	Past Allegations P.O.Devito Lost Radio
13	9/28/90	Re-interview of witness T. Johnson Photo Lineup
14	10/01/90	Re-interview Complt D. Jackson
15	10/2/90	Ident. Section Request
16	9/28/90	24 Hour Sprint Rún 10/2/90

17	9/28/90	Complt Report Voucher for found Drugs 9/26/90
18	9/28/90	Copies of Memo logs Feerick, Devito, Schultz
19	10/3/90	Sept 22 Sprint Print out
20	10/3/90	Criminal Records Robert Bethea
21	10/3/90	Criminal Records Benjamin Stokes
22	10/3/90	Criminal Records Denise Jackson
23	10/4/90	Conferral with Complt/Witness
24	10/10/90	Communications & Records Search
25	10/10/90	Precinct Records m\w descrep
26	10/11/90	Conf w ADA
27	10/10/90	Interview Witness Delgardo
28	10/10/90	Interview Witness Stokes
29	10/11/90	Communications Search
30	10/12/90	Communications Referral
31	10/15/90	Communications Search Job re:loss radio
32	10/15/90	Personnel Records Sgt's Nelson-Duffy
33	10/15/90	BCI Maribel Delgardo
34	10/17/90	Lab Inq.
35	10/19/90	Lab Analysis Report
36	10/22/90	Conferral with ADA
MISSING NUMBER 37		
38	10/23/90	Witness to ADA'S
39	10/20/90	Conferral with ADA/Witnesses
40	11/6/90	Subpoenas Receipt & Service
41	11/26/90	Conferral with ADA
42	11/28/90	Records Request
43	12/19/90	Complt./Witness Contact
44	1/3/91	Communications Search

44A	1/7/91	Letter From ADA Stephens re: Admin Procedures
45	1/16/91	Communications Search
46	1/17/91	GO15 Feerick(crossed out) Pct. Records Search
47	1/18/91	GO15 Rosario(crossed out)Ferick
48	1/18/91	GO15 Rosario
49	1/21/91	Arrest Information
50	1/21/91	Conferral with Stokes
51	1/22/91	Precinct Records Re 1/5/91 Arrest Stokes
52	1/23/91	Conferral with Stokes & his Attorney
53	1/23/91	Fax worksheet update to IAD
54	1/23/91	Conferral with XO IAD
55	1/24/91	GO15 PO Gale
56	1/24/91	GO15 PO Schultz
57	1/24/91	GO15 PO Devito
58	1/24/91	GO15 PO Carmody
59	1/28/91	Sept 25, Arrest Records Search
60	1/28/91	Do Do MN Narco Re: Above
61	1/28/91	Conferral with ADA Stephens
62	1/29/91	Conferral with Lieutenant TiffanyMNN
63	1/29/91	Man Narco Search Warrant
64	1/31/91	Transmission w/s thru 64
65	2/4/91	Attempt to locate Deft. from 9/25 arrests
66	2/6/91	Request CI-Records OCID
67	2/6/91	Conferral with Complt
68	2/6/91	OCID Records Search Tawana Smith (Freeman)
69	2/7/91	Attempt to interview Witness Freeman
70	2/11/91	Interview Deseree Freeman

71	2/13/91	Interview Monty
72	2/13/91	Fax latest Worksheets
73	2/13/91	Fax w/s & memo logs to IAD
74	3/7/91	Conferral with Witness Stokes
75	3/8/91	Conferral with Stokes/ AttorneyFlynn
76	3/11/91	Conferral with Johnson
77	3/12/91	Conferral with Stokes
78	3/13/91	Release of memo log
79	3/15/91	Fax to Sgt Blakley IAD
80	3/14/91	Conferral with Jackson complt
81	3/27/91	Receipt for Lt Feerick memo log
82	3/27/91	Copies of memo log Schultz
83	5/17/91	Conferral with ADA Stephens
84	4/23/91	Conferral with ADA ?????
85	6/6/91	Conferral with Sgt. Blakley IAD FAX
86	6/13/91	Conf w/ ADA Stephens
87	6/19/91	Conf with ADA Stephens
88	7/23/91	Conf with ADA
89	7/30/91	Conf with Complt
90	8/14/91	Conf with ADA DI DeM
91	8/27/91	Copy of Ch Spec & Letter from ADA(crossed out)
92	9/20/91	Conferral with Spec Cor ADA
93	9/23/91	Pick up Lt Feerick & memo log
94	10/15/91	Conferral with ADA Strauss
95	11/27/91	Conferral with ADA Strauss
96	12/2/91	FAX to IAD Blakley
97	12/30/91	Attempt to notify wit/complt
98	12/27/91	Conferral with ADA Strauss
99	1/9/92	After contacting complt & Witness ADA Strauss
100	1/13/92	Conferral with IAD staff copies sent

101	1/13/92	FAX to IAD Staff Lt Villada
102	1/16/92	IAD Log #10251 up date
103	1/29/92	Conferral with ADA
104	2/4/92	Conferral with complt & witness
105	2/4/92	Attempt to contact Witnesses
106	2/5/92	Conferral with ADA Strauss
107	2/6/92	Conferral with ADA Strauss
108	2/10/92	Conferral with ADA Strauss
108	2/12/92	Update w/s to IAD Sgt Blakley via mail
109	2/10/92	Conferral with ADA Strauss
110	2/13/92	Locksmith Information
111	2/14/92	Attempt to locate Denise Jackson
112	2/18/92	Additional Information
113	2/20/92	Conferral with ADA
114	2/24/92	Central Warrants Search
115	2/24/92	Attempt to locate witnesses
116	2/26/92	Confer/subp Service
117	2/27/92	25 pct Records Search
118	2/27/92	Personnel Records Update
119	2/27/92	Central Blkyn Warrants Search Request
120	3/2/92	Update of Work Sheets to IAD sgt Bla
121	3/4/92	Conferral w/P.O. Jones Warrant Div.
122	2/28/92	Subpoena Service
123	3/3/92	Conferral with ADA Strauss
124	3/20/92	Records Search
125	3/20/92	Personnel Records on 4
126	3/23/92	Telephone Messages Re Reporting Date & Time
127	3/23/92	UF49 Anticipated arrest to IAD and D/A

128	3/27/92	Grand Jury Indictment
129	3/27/92	On Line Booking Arrests Sheets
130	3/30/92	Arrest Report FAX Notifications
131	3/30/92	UF10 cards update (address/DOB)
132	3/30/92	UF49 Bases for Arrest and Suspension
133	3/30/92	Conferral with Dept Advocates Office
134	3/31/92	Update Work Sheets to Sgt Blakley IAD
135	3/31/92	Conferral with Dept Adv Office
136	4/2/92	Copy of Charges for arrested four
137	4/3/92	Modified Assignment Notification
138	4/10/92	Arrested MOS Photographed
139		Arrest Tracking Sheet
140	4/3/92	Communications Referral
141	4/16/92	Closing
142	5/1/92	Field work with ADA Strauss
143	5/5/92	Conferral with Complt/witnesses
144	8/19/92	Attempt to locate witness

A 51

FORMAL REQUEST BY ACTIVE LIEUTENANT JOHN COMPARETTO TO SIGN AFFIDAVIT ON BEHALF OF PATRICIA FEERICK DATED DECEMBER 15, 1994

DETF # 197-94

POLICE DEPARTMENT
CITY OF NEW YORK

December 15, 1994

From: Lt. John M. Comparetto, Drug Enforcement Task Force
To: Police Commissioner (through channels)
Subject: REQUEST TO SIGN AFFIDAVIT FROM DEFENSE ATTORNEY IN PATRICIA FEERICK CASE

1. On December 13, 1994, undersigned received a phone call at my home at approx. 10:15prn from a female who identified herself as former Lt. Patricia Feerick, 25 Precinct. Though she is not personally known to undersigned, I am familiar with some of the newspaper accounts of her recent conviction in Court.

2. Ms. Feerick advised undersigned that she had been in contact with the Lieutenants Benevolent Association and that my name has appeared on some affidavits that may be critical in her appeals process. She further advised that my name had not appeared in any Rosario material or in any part of the trial and asked if I would mind answering some questions relative to a Search Warrant that I Supervised in the 25 Precinct on September 26, 1990 while assigned to Manhattan North Narcotics District. Undersigned advised her that I would have no problem speaking to her or answering questions and I

would answer them to the best of my recollection if I were testifying in Court.

3. Based on this conversation, Ms. Feerick dropped off the attached affidavit on December 15, 1994, and has requested my signature.

4. This affidavit is true and correct as to my personal recollection. I do not have any paperwork or documentation available to refresh my memory regarding this conversation with Lt. Foley nor have I spoken to anyone regarding this matter in approx. four (4) years.

5. Respectfully request authorization to sign the attached affidavit.

6. For your consideration.

"s/Lt. John M. Comparetto"
John M. Comparetto
LIEUTENANT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6 6

---------- X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

AFFIDAVIT
Indictment No.
2303/92

PATRICIA FEERICK,ORLANDO ROSARIO
JOHN DEVITO andMAYRA SCHULTZ

Defendants

----------X

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

LIEUTENANT JOHN COMPARETTO, of the New York City Police Department, being duly sworn, affirms under penalty of perjury that:

1. I am a Lieutenant in the New York City Police Department, with over 21 years of Police service, I am currently assigned to the Drug Enforcement Task Force (a combined Federal, State and local anti-drug trafficking initiative).

2. I submit this affidavit to clarify when I first was contacted by Lieutenant Kim Foley regarding a search warrant that was executed by members of my command on September 26 1990 in the Tiano Towers complex.

3. In September of 1990, I was assigned to Manhattan North Narcotics which was responsible for investigating illegal narcotics activity in Patrol Borough Manhattan North.

4.On September 26, 1990 members under my command executed a search warrant in the Tiano Towers complex.

5. During the time period I was assigned to Manhattan North narcotics, to the best of my recollection and without any written documentation to assist me, I do not believe that I spoke with Lieutenant Kim Foley of Manhattan north FIAU regarding the execution of the September 26, 1990 search warrant at the Tiano Towers complex.

6. In December of 1990, I was transferred to Narcotics Borough Bronx, and was assigned to that unit until December of 1991.

7. While I was assigned to Narcotics Borough Bronx, to the best of my recollection I believe I had a conversation with Lieutenant Foley of Manhattan North FIAU.

8. To the best of my recollection I recall that the focus of this conversation focused upon the warrant that was executed on September 26, 1990.

9. To summarize, to the best of my recollection, and without any written documentation to refresh my recollection, I do not recall conferring with Lieutenant Kim Foley regarding the search warrant that was executed on September 26, 1990, within several days after the warrant was executed. To the best of my recollection, and without any written documentation to refresh my recollection I recall that the conversation that I had occurred while I was assigned to Bronx narcotics, several months later.

Dated: New York, New York
December , 1994

_____
JOHN COMPARETTO

Sworn to before me
this day of December, 1994

_____
Notary Public

1st. Endorsement

Commanding Officer, Drug Enforcement Task Force to Commanding Officer, Narcotics Division, December 16, 1994. Contents noted. Recommending forwarding through channels for appropriate review.

"s/James Raber"
James Raber
INSPECTOR

2nd Endorsement

Commanding Officer, Narcotics Division to Chief, Organized Crime Control. December 20, 1994. Recommend forwarding through channels to Deputy Commissioner Legal Matters. For consideration.

"s/Martin O'Boyle"
Martin O'Boyle
ASSISTANT CHIEF

3rd Endorsement

Chief, Organized Crime Control to Chief of Department. December 21, 1994. Attached request for authorization for a member of the service assigned to the Drug Enforcement Task to sign an affidavit submitted by defense attorney in case of Lieutenant Patricia Ferrick is forwarded for review and consideration.

"s/D.C. Charles Matthes for"
Charles G. Reuther
CHIEF
ORGANIZED CRIME CONTROL

IMF/imf
ATT

OCD #1371

4TH ENDORSEMENT

Chief of Department to Deputy Commissioner Legal Matters, December 21, 1994. Contents noted. Forwarded for your review and recommendations.

"s/John F. Timoney"
John F. Timoney
CHIEF OF DEPARTMENT

BN/sl

5TH ENDORSEMENT LB 1262/94

Deputy Commissioner, Legal Matters to Police Commissioner, January 13, 1995. I have reviewed this request and recommend that it be disapproved. The signing of this affidavit by Lieutenant Comparetto in support of a convicted felon is not in the best interests of the Department. Further, Lieutenant Comparetto should be instructed that it is inappropriate for him to represent to any party that his statements in this matter are provided on behalf of the New York City Police Department.

"s/Janet J. Lennon"
Janet J. Lennon
Deputy Commissioner
Legal Matters

JJL:js

DISAPPROVED
JAN 20 1995
"s/William J. Bratton"
POLICE COMMISSIONER

6TH ENDORSEMENT

OFFICE 0F THE POLICE COMMISSIONER to Chief of Department, January Please note the Police Commissioner's Disapproval. Additionally, instruct Lieutenent Comparetto as per 5th endorsement. Forwarded for your appropriate attention.

BY DIRECTION OF THE POLICE COMMISSIONER

"s/Lowell Stahl"
Lowell Stahl
Deputy Chief,
Commanding Officer
Police Commissioner's Office

LS/sjc

7TH ENDORSEMENT

Chief of Department to Chief of Organized Crime Control Bureau, January 23, 1995. Contents noted. Note Police Commissioner's DISAPPROVAL and comply with 5th endorsement.

"s/Louis R. Anemone"
Louis R. Anemone
Chief of Department

RJA/db

8th Endorsement

Chief, Organized Crime Control to Commanding Officer, Narcotics Division (Attention: Commanding Officer, Drug Enforcement Task Force). January 25, 1995. Matter DISAPPROVED by the Police Commissioner on January 20, 1995. In addition, Lieutenant Comparetto will comply with contents of 5th Endorsement. Forwarded for your appropriate attention.

"s/D.C. Robert Baumert for"
Martin O'Boyle
CHIEF
ORGANIZED CRIME CONTROL

RJB/imf

9th Endorsement

Commanding Officer, Narcotics Division to Commanding Officer, Drug Enforcement Task Force. January 26, 1995. Forwarded for information and appropriate attention. Note the Police Commissioner's DISAPPROVAL. Note contents of 5th endorsement. Submit report by February 3, 1995 regarding action taken.

"s/Walter Signorelli"
Walter Signorelli
Inspector
In-Command

blp/